The Central Law Journal.

SAINT LOUIS, SEPTEMBER 26, 1879.

CURRENT TOPICS.

A railroad company, it was held by the Supreme Court of Texas in the late case of *Cunningham* v. *International R. Co.*, is not liable in damages for the neglegent mismanagement of one of its trains, while used and controlled by an independent contractor, for construction purposes. BONNER J. said: "There is a marked distinction between the liability of the master for the acts of an ordinary servant, in the usual scope of his duties as such, and that of an employer for the acts of an independent contractor. This distinction rests upon the reasonable principle that, in a proper case, the liability of the master should be commensurate with the extent only of his right to control. Blackwell v. Wiswall, 24 Barb. 355; Steel v. R. R. Co. 81 E. C. L. 548; Callahan v. R. R. Co. 23 Iowa, 562; 1 Minor's Inst. 236; 1 Pars. Contr. 80 et seq.; Quarman v. Burnett, 6 M. & W. 499; Rapson v. Cubitt, 9 Ib. 710; Milligan v Wedge, 12 Ad. & E. 737; Reerde v. R'way Co. 4 Exch. 244; Knight v. Fox, 5 Ib. 721; Overton v. Freeman, 11 C. B. 867; Chicago v. Robbins, 2 Black, 418, 428; Robbins v. Chicago, 4 Wall, 657, 679; Water Co. v. Ware, 16 Wall, 566, 577; Ellis v. Gas Co. 2 El. & Bl. v. Ellis, 5 El. & Bl. 124; Hole v. R'way Co. 6 H. & N. 497; R. R. Co. v. Sanger, 15 Gratt. 241. The true test....by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of the employer only as to the result of the work and not as to the means by which it is accomplished. Shear. & Redf. on Neg. §§ 76–79; 1 Redf. on Railways, 505; Pack v. Mayor, etc. 4 Seld. 222; Gourdier v. Cormack, 2 E. D. Smith, 254. It is now the well established doctrine in England, and the generally prevailing rule in this country, that the ordinary relation of principal and agent, and master and servant, does not subsist in the case of an independent employee or contractor who is not under the immediate direction of the employer. Shear. & Redf. on Neg. §§ 79, 82."

In *Zink* v. *People* recently decided by the Court of Appeals of New York, the distinction between larceny and false pretences is illustrated. The property in the case having been consigned to the prisoner, billed to him, he having paid the freight thereon, and such title being given to him that he could have passed a good title to a *bona fide* purchaser it was held that a conviction for larceny was not good. DANFORTH J. said: "There is still in this State the crime of larceny and the crime of obtaining property under false pretences, with different definitions by statute, and subjecting the offenders to different punishments; the one a misdemeanor and the other a felony. All distinction between them has been abolished in some of the States of the Union; but until the legislature interferes, the courts of this state have no right to disregard that distinction, however technical it may seem. This distinction, as we understand it, is this: In larceny, the owner of the thing stolen has no intention to part with his property therein. In false pretences, the owner does intend to part with his property in the thing, but this intention is the result of fraudulent contrivances, and one test we conceive to be this: Could the offender confer a good title upon another by the sale and delivery of the thing (I do not mean to apply this test to the case of money, but to goods and chattels)? If obtained by larceny, it is clear he could not. Bassett v. Spofford, 45 N. Y. 388. If obtained by fraud, it is equally clear that he could, for in that case the property passes in the subject-matter. In the former case it does not. Trespass will not lie for goods obtained by fraud, because fraud does not transfer the property. Benjamin on Sales, 353; Root v. French, 13 Wend. 570. In Wilson v. State, 1 Porter (Ala.), 118, it is laid down as the law, 'that an indictment for larceny will not lie if it appear that the articles alleged to be stolen have been transferred so as to create any right of property

or by any consideration, express or implied, or agreement.' That was this case. It seems to us that the decision of this court in the case of Bassett v. Spofford, 45, N. Y. 388, recognizes the difference which we have suggested between false pretences and larceny, and, unless overruled by subsequent decision, controls the case at bar, and if followed, must lead to a reversal of this conviction. There can be no larceny where there is no trespass. People v. Call, 1 Denio, 123. Says Bishop, in his work on criminal law (vol. 2, § 817): 'There can be no trespass where there is a consent to the taking. Suppose the consent is obtained by fraud where the owner meant to part with his property absolutely and not merely with the temporary possession of it; the result is the same; for by reason of the consent there is still no trespass, therefore no larceny.' In Ross v. People, 5 Hill, 294, a conviction for larceny was reversed, 'because,' says Cowen, J., 'the goods were delivered by the owner with the intention to sell them,' and this although the pretended purchaser 'obtained them by false pretences and a design *ab initio* not to pay for them.' To the same effect is Mowrey v. Walsh, 8 Cow. 238, and the ground on which the People v. McDonald was placed by this court in 43 N. Y. 61, sustain the view we have endeavored to present."

SUGGESTIONS UPON CODE PROCEDURE AND CODE REVISION.

No. IV.—Code Revision in General, with Illustrations from Rules of Practice and their Construction.

In our last article we discussed, at some length, the general rules which should govern revisers in exercising, or withholding the exercise of revisory powers, and gave illustrations from rules of parties and pleadings. It is the purpose of the present article to give some suggestions upon points of practice, and applying the rules already laid down, to inquire as to the propriety of changing by revision, or leaving unchanged the rules of practice in certain enumerated cases.

Keeping in mind, then, the rules already enumerated, let us proceed; premising that practical utility, rather than method, is the controlling thought in all these articles, and that if some of our suggestions shall relate rather to rules of pleading than of practice, this idea or purpose will not be violated.

1. Much confusion has arisen in practice in the transition from the old to the new system, in the application and use of the demurrer. Under the former system, at law we had the general demurrer, which simply tested the sufficiency of the pleading, admitting the facts to be true as stated in the same. It had no formality or specification of causes, and was therefore simple. And the special demurrer, which was only used as a means of objection to a pleading for some matter of form merely, which was specified. In equity we had the demurrer to the bill, which is in the nature of an exception, and the exception to the plea or answer. The demurrer was to the jurisdiction to the equity, to the relief, to the form, etc., and in each case it might be to the whole or a part of the bill, and was essentially special; and the exception to the plea or answer might be to a part or the whole of the pleading, and was also special.

It is perhaps to be regretted, regard being had to the rules of simplicity and uniformity, that the codes had not imitated the chancery practice in spirit, and provided that all objections to pleadings should be taken by demurrer or exception (it matters little what name is given). This would have saved much confusion as to what should be taken advantage of by demurrer and what by motion, as we shall see as we proceed.

Instead of thus unifying the practice, the codes enumerate the causes of demurrer, and make them quite too narrow, and model them upon neither the one system nor the other. The courts adopting the literal system, under the maxim, "*Inclusio unius et exclusio alterius*," hold that there are no other causes of demurrer than those enumerated.

Let us examine for a moment the results of this course of codification and adjudication. The codes provide that a defect of parties shall be good ground for a demurrer. The courts hold that *defect* means *deficiency*, and not redundancy. Hence, where there are too many parties, a demurrer for this cause will not lie; but advantage may be taken of the fault in case of redundancy of plaintiffs, by the general

demurrer for want of sufficient facts, because the complaint must show a cause of action as to all the plaintiffs. And so, where there is a redundancy of defendants, the redundant defendant may demur for want of sufficient facts. But the defendants properly sued can only take advantage of the misjoinder by motion. Again duplicity, redundancy, repugnancy, and all the minor faults in pleading, such as were formerly reached by special demurrer, are beyond the reach of demurrer; and where there is any remedy it can only be by motion. And so in one of the code States, where a replication to a special answer still prevails, it was first held that departure could only be taken advantage of by motion. Though upon a process of reasoning only partially satisfactory the ruling was overruled, and the demurrer was held the proper mode of objection.

The rulings have been about to the effect that all substantial objections to pleadings that formerly existed still continue, and those not within the range of a demurrer must be reached by motion.

The objections to this system are numerous: 1. The enumeration of causes is without logical consistency, as abundantly appears from what has been said, and therefore beginners are all the time ready to blunder. 2. The common law rule in reference to what constitutes the record having been generally adopted, in all cases where a motion is the proper remedy, there can be no advantage taken of any ruling without a bill of exceptions, and that although the motion be in writing.

We then arrive at the conclusion that the system of demurrers, or rather the whole system of taking advantage of faults in pleading, is narrow and illogical, and the rulings under it have been technical; and that under the rules we have enumerated it should be reformed.

If it be said that the numerous rulings under the present system have made the practice under it sufficiently simple and uniform, we answer, this is true only as to lawyers of skill and experience. Rules of pleading and practice, while they can only be adapted to the understanding of lawyers, should not be so complicated as to require the very highest skill and experience. They should, at least, have such simplicity and logical consistency, that beginners would not be sure to blunder, nor even be as apt to blunder as to go right. We are aware that there is a prejudice against revision in such cases as those under consideration, but there is as much necessity for boldness in revising where necessity for reform is apparent, as in refusing it where unnecessary. It would be a curious study to inquire how much costs have been paid, and how much loss sustained by suitors in a single State, to enable us to reach the point where we now are, as indicated above. And when we add that there will be a perpetual repetition of the blunders growing out of the present condition of the system, and a consequent recurrence of the costs, losses and delays to suitors, we can not see how any one should hesitate for a moment.

The revision suggested is this: 1. Let the codes provide that all faults in pleading, whether of form or substance, may be taken advantage of by demurrer. 2. Let them direct that the demurrer shall plainly point out the fault complained of. This being done, the demurrer will run about thus: The defendant demurs, etc., because the complaint does not state facts sufficient, etc., or because the complaint is double in this, etc.; or the defendant demurs to that part of the complaint which reads, etc.; or which is contained within the following lines, etc.; or because there is a misjoinder of parties, in this, etc.; or because there is a non-joinder of parties, etc. Or, the plaintiff demurs, etc., because the answer is but an argumentative denial; or the answer contains both a general denial and a specific answer. Or, the defendant demurs to the reply because it is a departure from the complaint, etc., etc.

Thus the objections are all logically classified and are all in the record. Surely such a change would greatly simplify the practice.

The advantage thus gained meets the two objections suggested. It leads to logical unity and attains simplicity, promotes convenience in practice, and renders blundering only possible with the *incompetent*.

2. The practice in case of motions, and in the method of saving error of the court in its rulings upon them, is equally confused in many of the code States.

There is no step so frequent in practice as that of a motion, and yet in many of the States has the practice upon this subject been so narrowed by the purely technical rules of the common law that it requires a high order of skill to avoid blunders.

It is quite unnecessary at this point to refer in detail to the various provisions concerning exceptions upon rulings which have received this narrow construction, causing this narrow, technical and difficult system of practice to be established. Some of these provisions are obscure and are all of them attempts to follow the technical common law rules. But besides this, most of these provisions have received construction according to the strictest rules of the common law, and quite out of harmony with the spirit of simplification.

To point out the defects alluded to, we will give a few illustrations from cases which frequently occur in practice.

It is not usually required by express provision that motions in code procedure should be in writing except in a few enumerated cases. The provisions as to what shall be part of the record are usually modelled upon the strictest common law rules, and the rulings follow these rules with technical severity, the result of which we will proceed to show by the illustrations now proposed.

Take the case of an appeal from a justice's court, which is common in all the States. Suppose the record shows that the appeal was not perfected in time, or that there was no appeal bond, or any other fatal defect, and a motion is interposed by the appellee for a dismissal of the appeal and overruled by the court. Or suppose, on the other hand, that the record is perfect, and shows no cause for dismissal, but a motion to dismiss is overruled. Now in both cases it is held that the ruling of the lower court can not be revised without a *bill of exceptions*, showing the ground of the ruling. This would seem to a mere code lawyer like overlooking the substance for the shadow. But it is following a very technical rule. The reason given is that the appellate court has not before it the grounds upon which the ruling is based. But the answer is, where a motion is made upon the record. it can only be tested by the record which is sent up, but as our object is to point out legislative remedies rather than to review judicial decisions, we forbear argument upon these questions.

Again, suppose after setting out a cause of action or defense, the pleader, as is often the case, proceeds to set out what is alleged to be improper matter, assuming an illegal measure of damages, or the like. The opposite party may proceed to take issue and take advantage of the fault by objections to the admission of the testimony by which it is to be sustained. But this is by no means the only method of raising objections to the obnoxious allegations, nor is it generally the best method. If the alleged improper matter be left in the pleading it may be read to the jury and may be an element of prejudice tending to mislead them. The result is the objection is usually taken by *motion*, to expunge, reject or strike out, which though in the nature of an exception, under the chancery practice, is not under the code procedure, modeled after the common law, required to be in writing. If the motion be sustained the obnoxious allegations are ordered expunged or stricken out. But really though this expurgation or striking out takes place in contemplation of law, there is no actual manual expurgation. The order is like one sustaining an exception in chancery. The part held obnoxious to the objection is simply excluded from the further consideration of the court, but it remains in the pleading and among the files, and in case of an appeal might be copied into the record. But under the common law technical rules, strictly followed by the code rulings, the part thus stricken out ceases to be a part of the record, and no advantage can be taken of any of the rulings of the court, unless there be a bill of exceptions to bring the part of the record stricken out back. Though this is technical, yet it is according to strict legal analogy, and is logically consistent. There is but little use in the rule, but inasmuch as a court might exercise the power of actual manual expungation, the rule just referred to is the safest.

But let it be supposed that the motion is overruled, it would seem then that the record shows all the grounds of the action of the court without any bill of exceptions; that whatever reason is assigned in support of the motion or however grounded the same may be, both the grounds and the reasons are but inference or argument. That the ruling of the court should stand or fall upon the question whether the alleged obnoxious matter was rightly or wrongly in the pleading, and that this should be determined by the pleadings themselves, which are necessarily part of the record. But it has been held that in such cases no question can be raised as to the correctness of the ruling without a

bill of exceptions showing the ground of the ruling.

We do not point to these rulings with any view to criticise the courts. The only object of the criticism being to call attention to the illogical condition of the rules as they now stand, and to suggest emendation. These rules are settled as firmly as the force of repeated judicial decisions can settle them, and whether rightly or wrongly, the rules themselves are technical and inconvenient, but at the same time, as we shall presently see, the evils are easily remedied.

It is true that the last two examples come within the objections discussed under our first head in this number, and if the rule were adopted *requiring* all objections to be taken by demurrer, the evil complained of would be remedied; yet these are but representative cases, and represent an innumerable class of cases not relating to pleadings, and not embraced in the discussion and examination of the rules of objections to pleadings by demurrer and motion. These cases were selected simply because they belong to a numerous class and afford an easy illustration of the evil complained of.

We do not feel inclined to discuss at any considerable length the necessity for revision; these are rules of the common law practice which have been adopted pretty generally in code procedure, and have been carried out with great strictness by some of the courts, and even sometimes strained beyond their logical limits. But this affords no argument for revision. But the fact that the introduction and application of these technical rules has caused endless litigation, and has been a tax upon suitors, grievous and unnecessary, is the argument in favor of a change. We invite any lawyer to look at the digests of any of our code States and see how many cases have gone off upon *motions*, and in how many cases the merits have not been touched in the appellate courts for want of observance of these technical rules, and he will be convinced of the necessity of a change in this respect. The remedy is easy. Let it be declared that "all motions in a cause shall be reduced to writing, and being properly signed, shall be filed in the cause, and shall be deemed and taken to be part of the record of the cause without any bill of exceptions." This would be simple, easy, uniform, and prevent all blunders. It will not do to say we will not continue to blunder; for the inexperienced will ever, as they have ever done. Such a rule would be enforced by all the *nisi prius* judges, and necessarily cure the enumerated evils.

3. Another subject which deserves attention in this connection, and the last we shall consider, is that of *exceptions*. Under the code practice in those States where law and equity are administered together without distinction, the common law methods, with all their technicalities, are usually adopted, and in some of the States the code provisions, as construed by the courts, are far more exacting and technical than the common law rules. This technical strictness is nowhere more apparent than upon the subject under consideration.

The *exception* under consideration is the protest or objection entered to some ruling of the court rendered against the objector. The only object of an exception of this character at the common law was to place the ruling of the court and the basis of it in the record, when, without an exception and a bill of exceptions, the matter, which was the subject of exception, would not appear in the record. To illustrate: in an action at law the evidence composed no part of the record: hence without a bill of exceptions no error could be assigned upon any ruling in reference to the evidence upon the trial, and so the party aggrieved, in order to fairness to do the court and his adversary, must state his objection to the admissibility of the testimony, or to any other step proposed upon the trial, and if the ruling was against him, he would except, and place his exception or protest to the ruling in the record by tendering and having allowed and signed his bill of exceptions. This was formerly done at the time, before any further progress was had in the cause, but in process of time, exceptions were for expedition and convenience noted at the time and written out after the close of the trial. And so in all cases where the subject of the ruling did not appear in the record, it must be introduced by *bill of exception*, or no error could be assigned upon the ruling in an appellate court. But where the ruling appeared in the record, as where it was upon the sufficiency of a pleading upon demurrer, motion in arrest, or any other ruling where a bill of exceptions was not required to place the same in the record, no exception was necessary.

In fact no exception was of any avail whatever unless followed by a bill of exceptions. Nor indeed was there such a thing as an available exception in the common law practice which was not evidenced by a bill of exceptions. And a bill of exceptions was as necessary to the enforcement of an exception as was a declaration to the enforcement of a cause of action.

And so was the chancery practice. There the evidence, as well as every other step in the cause, is in writing and forms a part of the record, and hence the term exception, in the sense in which we are discussing it, was unknown to the chancery practice.

These propositions are easy, simple, uniform and logical, and certainly sufficiently technical and difficult. But what shall be thought of the codifier or legislator who, in a code the title of which proposes to "*simplify* and *abridge* the pleadings and practice in civil actions," shall so *simplify* and *abridge* as to strew unnecessarily all the way along the pathway of the beginner, in the form of additional technical requirements of the character under discussion, snares which shall embarrass and entrap him? Or rather, perhaps, who shall beset his pathway through his whole case with technical requirements which he is sure sometimes to omit, and which, if omitted are fatal to the same. But codifiers and legislatures under the direction of court construction have in some of the States, notably in Indiana, imposed technical rules on the subject of exceptions, which were unknown to the common law, which are unnecessary, illogical and vexatious. These rules serve no valuable purpose, are without sanction, and instead of simplifying and abridging, the rules tend to embarrass the unskilful and are a *snare* to the inexperienced, and ought at once to be *revised*. The added requirement is that whatever may be the character of the ruling, judgment or action of the court, if the defeated party do not have an exception entered of record, he waives all objection to the ruling and can never assign it for error. Whether the action of the court be upon a matter appearing upon the face of the record, or whether it require a bill of exceptions to place it there, it is all the same. If the ruling be upon demurrer to a pleading, a motion *non obstante*, in *arrest*, for a *new trial*, or any other ruling, an exception must be entered, or all error is waived. The writer remembers a single exception, which furnishes a most excellent illustration of the absurdity of this technical extent of the rule. It is this: If the defendant demur to the complaint, and the court overrule the demurrer, he must except, or his objection is waived. If he take issue, go to trial, and is defeated, he may move in arrest of judgment; but if the court overrule the motion, and he do not except, the objection to the complaint is forever waived. But if he say nothing, but let judgment go upon the verdict or finding, and appeal and assign for error the insufficiency of the complaint, and the court find it insufficient, the cause will be reversed, notwithstanding there is no exception to any ruling. A reason might probably be found to justify the seeming inconsistency, but as our allusions to these peculiarities are merely for the purpose of illustration, we shall not hunt for the reason.

It is attempted to justify this extreme technicality upon the ground of giving notice to the court and the adverse party. But there is really no necessity for such express notice; for if it be understood by the court and the adverse party that the defeated party may, without exceptions noted, take advantage of every erroneous ruling appearing in the record, the same result would be reached. For in practice every careful and skilful lawyer notes an exception to every adverse ruling, and thus the court and the adverse party are none the better guarded. It is only the unskilful and the inexperienced that blunder by omitting the observance of this really unnecessary and technical rule.

If it be said that it is so well settled that it is harmless now, we answer, look at the current reports and see if the lawyers have stopped blundering yet, and how frequently cases are decided without touching their merits, on account of the failure to except, where exception is a useless ceremony. There can be no more important principle of *code revision* than that which requires everything which is useless, cumbersome or redundant to be lopped off, especially where the lopping off simplifies, unifies and renders the practice more easy and logical, and where the revision or amendment, as we have said, *lessens* the *chances* of going wrong by the unwary and inexperienced;

in other words, where revision *simplifies* the practice.

The amendment, therefore, should be that no exception in practice should be necessary in any case except as the basis for a bill of exceptions, etc.

(The writer desires to say parenthetically, that *he* has no personal *spite* at these technical rules; that he has never failed in a case on account of their non-observance; but that he has often taken advantage of the breach of the same by good lawyers, through inadvertance on their part.)

A. I.

ICE READY FORMED IS PERSONALTY.

HIGGINS v. KUSTERER.

Supreme Court of Michigan, June Term, 1879.

1. THE ORIGINAL TITLE TO ICE is in the possessor of the water where it is formed, and it passes with that possession.

2. A SALE OF ICE READY FORMED, whether in or out of the water, as a distinct commodity, is a sale of personalty.

3. A PAROL BARGAIN FOR ICE, formed on the surface of a pond, both parties being in view thereof, and the price being paid on the spot: *Held*, to pass the title.

CAMPBELL, C. J., delivered the opinion of the court.

Higgins recovered below a judgment against Kusterer for the value of a quantity of ice. Kusterer claims that the title never passed to Higgins and that the property was lawfully acquired by himself from one Loder, who cut it on a pond belonging to one Coats and sold it to defendant.

The facts are briefly these: The ice in question was formed upon water which had spread over a spot of low ground partly belonging to Hendrick Coats, forming a basin, the land being dry in summer and in the rest of the year overflowed from a small brook leading into it. After the ice formed, and in February, 1878, Coats, by a parol bargain, sold all the ice in his part of the basin to Higgins for fifty cents. The parties at the time stood near by in view of the ice, and the quantity sold was pointed out, and the money paid. The ice was then all uncut. About two weeks thereafter John Loder, knowing that Higgins had purchased and claimed the ice, and having been warned thereof by Coats, offered Coats five dollars for the ice, which Coats accepted, and Loder cut it and sold it to Kusterer, who had made a previous verbal contract with Loder for it. Higgins was present when the ice was loaded on Kusterer's sleigh and forbade the loading and removal, on the ground that he had purchased it from Coats. Kusterer referred the matter to Coats, who said he had sold it to Loder. The only question presented is whether Higgins was owner of the ice.

The case was argued very ably and very fully, and the whole subject of the nature of ice as property, was discussed in all its bearings. We do not, however, propose to consider any question not arising in the case.

The record is free from any complication which might arise under other circumstances. There are no conflicting purchasers in good faith without notice. Loder and Kusterer had full notice of the claims of Higgins before they expended any money. The sale to Higgins was not a sale of such ice as might from time to time be formed on the pond, but of ice which was there already, and which, if not cut, would disappear with the coming of mild weather and have no further existence. It was not like crops or fruit connected with the soil by roots or trees through which they gained nourishment before maturity. It was only the product of running water, a portion of which became fixed by freezing, and if not removed in that condition would lose its identity by melting. In its frozen condition it drew nothing from the land, and got no more support from it than a log floating on the water would have had. Its only value consisted in its disposable quality as capable of removal from the water while solid, and of storage where it might be kept in its solid state, which could not be preserved without such removal. If left where it was formed it would disappear entirely.

While we think there can be no doubt that the original title to ice must be in the possessor of the water where it is formed, and while it would pass with that possession, yet it seems absurd to hold that a product which can have no use or value except as it is taken away from the water, and which may at any time be removed from the freehold by the moving of the water, or lose existence entirely by melting, should be classed as realty instead of personalty, when the owner of the freehold chooses to sell it by itself. When once severed no skill can join it it again to the realty. It has no more organic connection with the estate than anything else has that can float upon the water. Any breakage may sweep it down the stream and thus cut off the property of the freeholder. It has less permanence than any crop that is raised upon the land, and its detention in any particular spot is liable to be broken by many accidents. It must be gathered while fixed in place, or not at all, and can only be kept in existence by cold weather. In the present case the peculiar situation of the pond rendered it likely that the ice could not float away until nearly destroyed, but it could not be preserved from the other risks and incidents of its precarious existence. Any storm or shock might in a moment convert it into floating masses which no ingenuity of black-letter metaphysics could annex to the freehold.

It does not seem to us that it would be profitable to attempt to determine such a case as the present by applying the inconsistent and sometimes almost whimsical rules that have been devised concerning the legal character of crops and emblements. Ice has not been much dealt with as property until very modern times, and no settled body

of legal rules has been determined upon concerning it. So far as the principles of the common law go, they usually, if not universally, treated nothing movable as realty unless either permanently or organically connected with the land. The tendency of modern authority, especially in regard to fixtures, has been to treat such property according to its purposes and uses as far as possible.

The ephemeral character of ice renders it incapable of any permanent or beneficial use as part of the soil, and it is only valuable when removed from its original place. Its connection—if its position in the water can be called a connection—is neither organic nor lasting. Its removal or disappearance can take nothing from the land. It can only be used and sold as personalty, and its only use tends to its immediate destruction. We think that it should be dealt with in law according to its uses in fact, and that any sale of ice already formed, as a distinct commodity, should be held a sale of personalty, whether in the water or out of the water.

We shall not attempt to discuss cases where the bargain includes future uses of land and water, and interests in ice not yet frozen. Whether such dealings are to be regarded as leases or licenses, or executory sales, may be properly discussed when they occur.

We think the sale in the present case was rightly held to be a sale of personalty. The judgment must be affirmed with costs.

NEGLIGENCE — DUTY OF PERSON DEALING WITH DANGEROUS ARTICLE.

PARRY v. SMITH.

English High Court, Common Pleas Division, May, 1879.

A person using, or dealing with an article dangerous in itself, is bound to use great caution. If he does not do so, and if a third party is injured, the person injured has a right of action against the person dealing with the dangerous article. To support such an action there need be no privity of contract between the party injured and the person by whose breach of duty the injury is caused.

The plaintiff was in the employ of Moses & Sons as one of their housekeepers; the defendant was a gas-fitter employed by Moses & Sons to repair a gas-meter in a cellar on the premises where the plaintiff was employed.

The defendant found it necessary to take away the meter to repair it, and replaced it by a temporary connection, consisting of a flexible tube, one end of which was pushed into the inlet pipe, and the other into the pipe communicating with the house. The ends of both these pipes were bound up with rag and string, and puttied up; and a box was put under the curve of the tube so as to support it, and take the weight off the fastening. After this temporary connection had been so placed, the plaintiff, whose duty it was to turn off the gas in the cellar, went there for that purpose with a light. Directly the plaintiff opened the cellar door, an explosion took place, and he was knocked down and seriously injured.

The action, which was for the recovery of damages for the injuries thus caused to the plaintiff, was tried before Lopes, J., at the Michaelmas Sittings in London, 1878. Evidence was called on both sides, the plaintiff's evidence going to show that the mode of the connection by means of the flexible tube was unsafe; the defendant's that it was safe. It was agreed that the damages, if the plaintiff recovered, should be £50.

At the conclusion of the plaintiff's case, *Waddy, Q. C.*, on behalf of the defendant, submitted that there was no case to go to the jury. The judge thought that there was, and would not stop the case, but consented to reserve judgment to consider the points of law, and to make any amendments necessary to raise the real questions between the parties.

The three following questions were left to the jury: (1). Was the defendant negligent in doing his work? (2). Did the accident proceed entirely from the defendant's negligence? (3). Was the plaintiff also negligent, and was his negligence such that, but for his negligence, the accident would not have happened?

The jury were told that if they answered the first two questions in the affirmative, they need not consider the third. The jury answered the first two questions in the affirmative, and gave a verdict for the plaintiff for £50.

Finlay & Boddam, for the plaintiff.—The defendant was guilty of personal negligence in the course of his work. He knew that he was dealing with an article dangerous in itself, and by not taking care how he dealt with that dangerous article, he was guilty of a breach of duty. The plaintiff, while lawfully on the premises, was injured by reason of the defendant's negligence, and the plaintiff, as the person injured, has a right of action. The action is not for a breach of contract, but for a tort independent of contract. In an action like this, there need be no privity between the plaintiff and the defendant: Farrant v. Barnes, 31 L. J. C. P. 137, 10 W. R. C. L. Dig. 10; Corby v. Hill, 6 W. R. 575, 4 C. B. N. S. 556; Gladwell v. Steggall, 5 Bing. N. C. 733; Martin v. Great Indian Peninsular Railway Company, L. R. 3 Ex. 9, 16 W. R. C. L. Dig. 18; George v. Skivington, 18 W. R. 118, L. R. 5 Ex. 1; Sullivan v. Waters, 14 Ir. C. L. Rep. 460.

Waddy, Q. C., and *Oppenheim*, for the defendant.—The point that the gas was a dangerous article is taken to-day for the first time. It is not in the statement of claim, nor was it put to the jury at the trial; so the plaintiff can not avail himself of the point now. This case is really for breach of contract, not for a tort. The plaintiff alleges no duty in his statement of claim, and without such an allegation he can not recover. [LOPES, J.: I shall allow any amendment that will put the real question in issue; and I shall consider any amendment as made which the facts proved at the trial will support.] In Farrant v. Barnes, the dangerous nature of the article was concealed; but there was no concealment here. In Collis v. Selden, 16

W. R. 1170, L. R. 3 C. P. 495, a demurrer to a declaration was allowed, because the latter disclosed no duty by the defendant to the plaintiff for breach of which an action would lie. That case governs the present; see the judgment of Mr. Justice Willes. In Corby v. Hill, the road was a private one: but as persons had been invited to make use of it, the defendant was liable for the obstruction causing damage to the plaintiff. George v. Skivington was decided on the ground taken in Langridge v. Levy, 2 M. & W. 519, 4 M. & W. 337. The cases of Wright v. Winterbottom, 10 M. & W. 109; Blakemore v. Bristol and Exeter Railway Company, 6 W. R. 336, 8 E. & B. 1035, and Robertson v. Fleming, 4 Macq. 167, show that (1) breach of public duty, (2) breach of private contract, (3) fraud or concealment, are the only causes of action upon which a third person can recover. [*Finlay* referred to Rapson v. Cubitt, 9 M. & W. 710, as being strongly in favor of the plaintiff.] It is clear from Longmeid v. Holliday, 6 Ex. 761, that public duty is concerned with something that has to do with the general public; and that a breach of something that interferes with three or four people is not a breach of public duty.

Finlay in reply. *Cur. adv. vult.*

LOPES, J.:

I think the plaintiff 's right of action is founded on a duty which, I believe, attaches in every case where a person is using, or is dealing with, a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders. To support such a right of action there need be no privity between the party injured and him by whose breach of duty the injury is caused, nor need there be any misrepresentation or concealment, nor need what is done by the defendant amount to a public nuisance—it is a misfeasance, independent of contract.

It is strange there is no direct authority on this point; a large number of cases were cited, but none of them directly in point.

The case of Collis v. Selden was relied on by Mr. Waddy in argument. This was a demurrer to a declaration, and it was held that the declaration was bad, because it did not disclose any duty by the defendant towards the plaintiff for the breach of which an action would lie. Mr. Justice Willes, in his judgment, seems to have contemplated an action like the present, for he says: "The declaration is not founded upon any duty of the occupiers to protect persons lawfully serving them against any hidden danger of which the defendant knew, or had a right to have known, but is founded on alleged carelessness in doing an act—namely, hanging a chandelier. The chandelier is to be regarded as movable property, and the declaration should have shown either that it was a thing dangerous in itself, and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house." Rapson v. Cubitt, cited by Mr. Finlay, is in point. There the defendant, a builder, was employed by the committee of a club to execute certain alterations at the club-house, including the preparation and fitting of gas fittings. He made a sub-contract with B., a gas-fitter, to execute part of the work. In the course of doing it the gas exploded and injured the plaintiff, who was the butler of the club. It was held that the defendant was not liable, on the ground that B. was not his servant, but an independent sub-contractor. It seems, however, to have been assumed that an action against B. would have been maintainable. All the cases cited are distinguishable from this case, and they are not cases where the the alleged cause of action is in respect of a breach of duty in dealing with a thing in its nature dangerous, and likely to cause injury, unless great care is used.

There must be judgment for the plaintiff for £50 and costs.

CORPORATIONS —CERTIFICATES OF STOCK —TRANSFER.

PEOPLE'S BANK v. GRIDLEY.

Supreme Court of Illinois.

[Filed at Springfield, June 20, 1879.]

Where the by-laws of a corporation require that stock shall be transferred on the books of the company, a transfer by assignment and delivery only will not effective, even as against a subsequent judgment creditor of the transferor.

SCHOLFIELD, J., delivered the opinion of the court:

This case comes before us by appeal from the appellate court of the third district. The facts are: The fourth section of the charter of the Bloomington and Normal Horse Railway Company provides that the capital stock of that company "shall be divided into shares of one hundred dollars each, and shall be issued and transferred in such manner and upon such conditions as the board of directors may direct," and the sixth section provides that "the said corporation by its board of directors shall have power to make, ordain and establish all such by-laws, rules and regulations as said directors shall deem needful and expedient to carry into effect the purposes of this act and for the well ordering, regulation and management of affairs, business and interests of said corporation; provided, the same be not repugnant to this act or to the laws or constitution of the State or the United States." Under the authority of these provisions, on the 28th of March, 1867, the board of directors of that company adopted the following by-laws: "The transfer of stock shall only be made upon the books of the secretary on the presentation of the stock certificate properly endorsed." In the summer of 1867, William A. Pennell became the owner of one hundred shares of stock in that company, and ten certificates, each representing ten shares of stock, of the par value of one thousand dollars, were issued to him. In the body of each certificate was this language: "Subject to the by-laws of said company—transferable only on the books of the company on the surrender of this certificate.

On the 10th of November, 1873, Pennell and the Ruttan Heating and Ventilating Company, being indebted to the appellant for $7,400—borrowed money,—Pennell assigned and delivered these certificates of stock to the appellant to secure that indebtedness, and also to procure future advances to be made. The appellant has since held possession of the certificates, but no transfer of the stock of which they evidence ownership, has been made on the books of the company. Of the indebtedness existing when they were assigned and delivered there remains due $2,650, and there has also been advanced $1,400 since, which remains due and unpaid. On the 7th of May, 1877, in vacation of the McLean circuit court, the appellees, Asahel and Edward B. Gridley, as A. Gridley & Son, recovered a judgment by confession against Wm. A. Pennell for $1,000 and costs of suit. On the same day execution was issued on the judgment and the sheriff of McLean county, by virtue thereof, levied upon Pennell's shares of stock in the Horse Railway Company, making his levy in conformity with the directions of the statute relating to from hand to hand by endorsement and delivery, unless the books of the company is the proper place to ascertain the title of purchaser or assignee of stock, what possible end can be subserved by requiring a copy of the execution to be left with the clerk, treasurer or cashier of the company, &c.? And with what sense could it be said this should be regarded as a seizure of the stock on execution?

What we regard as the correct doctrine is well stated by the late Judge Redfield, in his note to Fisher v. The President, Directors, &c. of the Essex Bank, 1 Am. Railway Cases, 127. He says: "It seems to be agreed upon all hands that in the case of a mere pledge of shares for the security of a debt, a formal delivery will be required to create or to consummate the contract, since it is of the very essence of a pledge that the possession be transferred to the pledgee. For as the general title of the thing still remains in the pledger, unless the possession were transferred, there would be nothing to uphold the contract. Redfield on Bailm. § § 659–674, and cases cited. This may be effected by a formal or even a blank endorsement or assignment of the certificates and delivery of the same to the assignee. Nothing more is ordinarily required to complete the contract as between the immediate parties. But as to third, something more is commonly required. Some such visible or ascertainable index of the change of ownership as will naturally put those interested in the question upon inquiry, and thus lead them to correct information upon the subject, must exist. 1 Story's Eq. Jur. § 421b, and cases cited in note. Some of the American States have attempted to maintain a different rule, as that the assignment being complete between the parties will be held good as to third parties whose rights are subsequently acquired and perfected by actual possession, without knowledge of the prior transfer. Muir v. Schenck, 3 Hill (N. Y.), 228, and cases cited by Cowen, J., in the opinion of the court. But this rule has never obtained in England, and only to a very limited extent in this country, and is repudiated by all the best authorities. 1 Story Eq. Jur. § 421 c., and cases cited. But we think there can be no fair question, that where the law of the States, as applicable to corporations whether it be by a provision in the charters of the particular company, or by a general statute, or settled course of decisions in the court, requires that shares shall be transferred in a particular mode, as in the present case; that they shall be 'transferrable only at its banking house and on its books,' there must be a substantial compliance with the requirements in order to protect the property against future assignments or levies."

These views are sustained by Fisher v. The President, &c. of the Essex Bank, 5 Gray, 373; Sabin v. The Bank of Woodstock, 21 Vt. 353; Oxford Turnpike v. Bunnel, 6 Conn. 558; Pinkerton v. Manchester R. R. Co., 42 N. H. 424; Pittsburgh & Conn. R. v. Clarke, 29 Penn. St. 146; Dutton v. Conn. Bank, 13 Conn. 498; Skowhegan Bank v. Cutler, 49 Maine, 315; Lockwood v. Mech. Nat. Bank, 9 R. I. 308; Agricultural Bank v. Burr, 24 Maine, 256; Blanchard v. Dedham Gas Co., 12 Gray, 213; and in People *ex rel.* v. Devin, 17 Ill. 86, this court by implication endorses the doctrine. No point is made, nor is any tenable, that the resolution of the board of directors, and not the express declaration of the charter, prohibits a transfer of stock otherwise than levies of that description. The appellees Asahael and Edward B. Gridley and the Horse Railway Co. had no actual notice that the certificates of stock had been assigned and delivered to appellant until after the levy of the execution. The appellate court held that the stock not having been transferred on the books of the Horse Railway Company before the levy was made, the levy is entitled to priority over any claim in behalf of appellant, and this ruling presents the only question to be now determined.

Appellant insists that Kellogg v. Stockwell, 75 Ill. 68, settles that the ruling below was erroneous. That was a bill in equity to protect the original owner of corporate stock from assessments made by the corporation after he had sold his stock, filed by such owner against his vendee. There had been no transfer of the stock upon the books of the corporation, and there was a clause in the charter providing that shares of stock should be transferred only on the books of the corporation. It was said that this provision in the charter was designed for the protection of the company, and perhaps a purchaser without notice, but it was held as between the vendor and vendee, a sale and transfer will be good without being entered upon the company's books, and will be enforced in equity, and a decree requiring the vendee of the stock to pay or indemnify the vendor on account of the assessments was affirmed. But there is no question here between vendor or vendee or pledgor and pledgee. The question is between two parties having equally meritorious claims against the original owner of the stock, each claiming a prior lien over the other, the one by virtue of the pledge, the other by virtue of the levy of the execution. Our statute provides, § 52, chap. 77 (R. S. 1874,

p. 628): "The shares or interests of a stockholder in any corporation may be taken on execution and sold as hereinafter provided. § 53. If the property has not been attached in the same suit, the officer shall leave an attested copy of the execution with the clerk, treasurer or cashier of the company, if there is any such officer, otherwise with any officer or person having the custody of the books and papers of the corporation, and the property shall be considered as seized on execution, when the copy is so left, and shall be sold in like manner as goods and chattels. * * * § 55. The officer of the company who keeps a record or account of the shares or interest of the stockholders therein, shall, upon the exhibiting to him of the execution, be bound to give a certificate of the number of shares or amount of the interest held by the judgment debtor. If he refuses to do so, or if he wilfully gives a false certificate therefor, he shall be liable for double the amount of all damages occasioned by such refusal or false certificate, to be recovered in any proper action, unless the judgment is satisfied by the original defendant. § 56. An attached copy of the execution and of the return thereon, shall, within fifteen days after the sale, be left with the officer of the company, whose duty it is to record transfers of shares, and the purchaser shall thereafter be entitled to a certificate or certificates of the shares bought by him upon paying the fees therefor, and for recording the transfer." * * *

It is too obvious to justify extended comment that these provisions contemplate that, as against a judgment creditor's title to, the stock can only pass by transfer on the books of the company, for if it might be otherwise transferred, as by endorsement, delivery of the certificates alone, these provisions could have no practical operation. If the mere transfer of the certificates under contract of sale shall sufficiently pass title, of what worth can the certificates required by § 55 be?

How can a certificate of shares purchased on execution, as provided by § 56, be of any avail, if the original certificate be out and be transferable on the books of the company? The board of directors were expressly empowered by the charter to provide for the mode of transfer, and that was all that was necessary. Lockwood v. Mech. Nat. Bank, *supra*.

The cases in New York and New Jersey relied upon by counsel for appellant, recognizing a doctrine not in harmony with that here endorsed, do not commend themselves to our approval. The judgment of the appellate court is affirmed.

Affirmed.

RECEIVERS—POWER OF COURT APPOINTING THEM TO CONTROL THE LITIGATION.

BANK v. SIMPSON.

Supreme Court of Kansas, July Term, 1879.

1. THE APPOINTMENT OF A RECEIVER by the district court secures to that court the power to control, at its discretion, all controversies which affect the property placed in his custody as such receiver.

2. POWER OF COURT TO PROTECT RECEIVER. — A court of equity will, on proper application, protect its own receiver, when the possession which he holds, under the authority of the court, is sought to be disturbed. It also has the power to reach parties to actions affecting property placed in the hands of it receivers and compel them to proceed no where else than in its own forum.

3. LEAVE TO SUE ON CONDITION.—Where M proposes to bring an action in which he desires to join C in his official capacity as receiver as a party defendant, and applies to the court appointing the receiver for leave so to do, and the court grants such permission, but requires the action to be brought and tried in its own forum, and in no other court: *Held*, not error.

4. REVOCATION OF LEAVE.—Where such proposed action is then brought in the court granting the permission to sue the receiver, and M, the plaintiff, presents his petition and bond for a removal of the cause to the Circuit Court of the United States, for the district of Kansas: *Held*, not error for the court, of its own motion, to revoke the order granting permission to sue the receiver and dismiss the action pending against him.

Error from Douglas county.

Bassett & Hurd, for plaintiff in error; *S. O. Thatcher*, for defendants in error.

First: On December 10, 1877, William A. Simpson commenced an action against Joseph J. Crippen in the district court for Douglas county, for an accounting and dissolution of their partnership, and on the same day by an order made in the action, by the judge of said district court, James S. Crew was appointed a receiver to take possession of the partnership property and pay the partnership debts. On February 28, 1878, the Meredith Village Savings Bank filed a petition in said action, representing that it was a private banking corporation, organized under the laws of the State of New Hampshire, located and having its place of business at the village of Meredith, in said State, and that the said William A. Simpson and Joseph J. Crippen on December 10, 1877, and for a long time prior thereto were partners, doing a banking and collection business under the name of the Simpson Bank, at the city of Lawrence, in this State.

In said petition it was further represented that said Simpson and Crippen, as the agents of the petitioner collected certain moneys due the petitioner, to wit: the sum of $1,556.22, and that said sum of $1,556.22, the property of the petitioner, passed into the possession of said James S. Crew as receiver, with the assets of said partnership, and that the said William A. Simpson, Joseph J. Crippen and James S. Crew had refused to deliver the money to petitioner on demand therefor; wherefore the petitioner prayed for leave to join said receiver with said William A. Simpson and Joseph J. Crippen in an action for the recovery of said property.

Afterwards, on February 28, 1878, on the hearing of said petition, the district court found that the controversy between the said parties could be best determined by an action, and that the receiver might be made a party thereto, and ordered,

the receiver consenting, that permission be given to said petitioner to join said receiver as a defendant in such proposed action; and further ordered, over the exceptions of said petitioner, that such permission should extend only to an action to be brought and tried in said district court, and in no other court.

The plaintiff in error avers that there is error in said record and proceedings in this: 1. That the said district court erred in refusing the said Meredith Village Savings Bank its choice of a forum wherein to bring its action. 2. That the said district court erred in restricting such permission to sue to an action to be brought and tried in said court and in no other court. 3. That the said district court erred in denying to the said Meredith Village Savings Bank its lawful and constitutional right to bring and try said action in some other court.

Second: On March 20, 1878, the said Meredith Village Savings Bank commenced an action against the said William A. Simpson and Joseph J. Crippen, partners doing business under the name of the Simpson Bank, and James S. Crew, as receiver of said partnership, in the District Court for Douglas County, in said State, to recover possession of certain personal property, or the value thereof, if a delivery could not be had, and for an order on said receiver for a delivery of said property, or on failure to do this, directing him to pay the value thereof, with statutory damages for its detention.

On June 1, 1878, the said Meredith Village Savings Bank filed a petition and bond in said action for the removal of the cause to the Circuit Court of the United States for the district of Kansas, representing that it was a citizen of the State of New Hampshire; that the said defendants were citizens of the State of Kansas; that the amount in controversy, exclusive of costs, exceeded the sum of $500; that said cause had not been tried and was not triable at the then present term of said district court, and praying said district court to accept said surety and bond and make the order of removal required by law, and cause the record of said suit to be removed into said circuit court.

That afterwards, on the hearing of said petition, the district court on its own motion, and not at the request of said receiver, made an order over the exceptions of the said Meredith Village Savings Bank, revoking the order before granted to the said Meredith Village Savings Bank for leave to sue the said receiver, James S. Crew, and made the further order, over the exceptions of the said Meredith Village Savings Bank, dismissing said action as to the said Crew at the cost of the plaintiff.

And the plaintiff in error avers that there is error in said record and proceedings in this: 1. That the said district court erred in revoking its former order, granting permission to sue said receiver. 2. That the said district court erred in ordering a dismissal of the said action against the said James S. Crew as receiver. 3. That the said district court erred in making said order of revocation and dismissal on its own motion, and in entering judgment against said plaintiff for costs. 4. That the said district court erred in entering said order of dismissal, for that the said court at the time of making said order had no jurisdiction of said cause or of the parties thereto.

Additional matters are set forth in the opinion. Plaintiff in error (plaintiff in the court below) brings the action here on error for review.

HORTON, C. J., delivered the opinion of the court.

This action was brought in the court below to recover possession of certain personal property, consisting of United States and National bank notes of the value of $1,556.22 alleged to have been received by W. A. Simpson and J. J. Crippen, as the agents of the said savings bank, and as the property of said bank. The petition further alleged that Simpson and Crippen received the bank notes in 1877, while co-partners in business, under the name of the Simpson Bank of the City of Lawrence, in this State; that on December 10th, 1877, the said James S. Crew was duly appointed the receiver by the district court of Douglas County in an action brought by the said W. A. Simpson against J. J. Crippen for an accounting between the partners and a dissolution of the partnership; that said savings bank was entitled to the immediate possession of the property, and that the defendants unlawfully detained the same. The action was not in form prosecuted against the receiver as an individual, but named him as receiver appointed by the said district court and in custody of partnership property. At the commencement of this proceeding the plaintiff in error presented to the court, by which the receiver was appointed, an application for leave to make him a party defendant to this action. The court granted the motion, the attorney of the receiver consenting, but further ordered that such permission to join the receiver as defendant should extend only to an action to be brought and tried in said district court. Afterwards the pleadings in the case were made up, and then the plaintiff in error presented his petition and bond for a removal of the cause to the Circuit court of the United States for the District of Kansas. Thereupon the court revoked the permission before granted for the plaintiff to sue the receiver and dismissed the action as to Crew, at the costs of such plaintiff.

The various assignments of error alleged in the petition of error are embraced in two inquiries:

First—Did the court below err in restricting the plaintiff in error in the prosecution of his cause of action to the court appointing the receiver?

Second—Did the court err in revoking this order and dismissing the action against Crew?

The determination of the first question is mainly decisive of the second, because if the court had the power to designate the forum in which its receiver was to be sued, it clearly had the authority to revoke its permission when it was sought to be evaded or abused. The proceeding instituted by the plaintiff not only questioned the title or right of the receiver to the property claimed, but sought to disturb the possession which he held under the authority of the court. A receiver of a court of justice has been well said to be the arm of the court by which he is appointed—a part of the court itself. He is the agent of no one except the court by which

he is authorized to act. One court having custody of property through its receiver cannot admit that another court, in defiance of its orders, has power to define what are his duties with reference to such property. To admit this, is substantially to say that one co-ordinate court can sue another. This can not be done. The rule stated is established by so many authorities that citation is scarcely necessary. Every consideration of economy, of the prevention of vexatious litigation and conflict of jurisdiction, would indicate the importance of protecting the exclusive possession of the receiver by an inflexible rule of law. Even the cases of Kinney v. Crocker, 18 Wis. 74, and Allen v. Central R. Co., 42 Iowa, 683, 3 Cent. L. J. 434, which assert the right in some actions to sue receivers, without leave to prosecute being first obtained of the court appointing them, concede "that a court of equity will on proper application protect its own receiver, when the possession which he holds under the authority of the court is sought to be disturbed."

The appointment of Crew as receiver of the effects and property of the partnership in the action of Simpson v. Crippen by the court below, secured to that court the power to control, at its discretion, all controversies which affected the property placed in his custody. It therefore had the right to take to itself all such controversies and compel parties to proceed nowhere else than in its own forum. Railroad Co. v. Smith, 19 Kan. 229.

In this case the plaintiff in error very properly asked permission of the court, before bringing the action, to join the receiver as a defendant in the case. The permission was granted, and within the principles above stated, the court to maintain its control over its officer and the property in his charge, restricted the action to its own jurisdiction and denied the plaintiff authority to prosecute its agent in any other court. No error was thereby committed. If it had the right to take to itself the controversy over this property, it surely had power to make the order complained of. In fact, it adopted the practice generally pursued. In most cases, the court appointing the receiver upon motion, or in any other mode it may think best, hears the complaint and defenses, and upon the issue made and the proof adduced on both sides, grants or denies the relief as the court may deem right and proper. Of course, this court would have had the right to review on error any of the proceedings of the inferior court, if the action had been prosecuted therein under the permission granted, as this court has appellate jurisdiction, and the order of that court can not be construed or assumed to interfere with the power granted to the Supreme Court.

The power of the district court to take to itself all controversies affecting the property placed in the hands of the receiver, and compel parties to proceed nowhere else than in its own forum, must necessarily include the power exercised by it in dismissing the case against Crew. It granted the permission in the first instance—it had the right to revoke the permission when it was sought to be abused. A court ought never to permit its process to be improperly used, nor allow its orders, obtained for one purpose, to be wrongfully applied to a different and contrary purpose. The court granted permission to join the defendant in an action in its own forum, and the plaintiff seeks to make this order the basis to oust the court of its jurisdiction, or a bridge to pass over into another forum. The order was granted that the district court might assume jurisdiction of the controversy between plaintiff and the receiver, and the plaintiff seeks to abuse the order, to transfer the controversy to another jurisdiction. This is unfair to the court. If sustained, it defeats the very purpose for which the permission was given.

The theory of counsel to a different conclusion is unsound. It rests upon no stable foundation. Even assuming the plaintiff had the right to bring the action without any previous assent having been given, within Railroad v. Smith, *supra*, the district court, with all the parties before it, had the power to compel the plaintiff to proceed nowhere else. Counsel contend, however, that the court had no power to refuse the removal to the United States Circuit Court and could do nothing to affect the right of the petitioner. Certainly the court had the right to look into the case when the petition and bond were presented for acceptance and see whether it came within the statute. Goddard v. Bosson, 21 Kas. 139.

When it made this examination it at once ascertained the case within the practice and decisions of the federal courts, as to Crew, was not removable. It had been the frequent and uniform ruling of the federal courts that a suit can not be commenced against a receiver without leave being first obtained from the court appointing such receiver. At the time of the filing of the petition and bond for removal, consent had been obtained to sue in the district court of Douglas county, but this consent was burdened with the limitations that the controversy with the receiver was to be settled in that court, subject, of course, to appeal on error proceedings, in the appellate court. The permission to sue was coupled with an imperative injunction not to go to any other court; and as the court had the power to affix to the permission this injuction, the case could not be removed, as to the receiver, without the consent of the court granting it. The case, under the circumstances, was not an ordinary action, and the consent of the court was absolutely essential for the prosecution of the action in the circuit court, by the well-established rules again and again announced by the federal courts.

In the absence of this consent, any action or order of this court, even if favorable to the plaintiff in error, would avail him nothing, as the rules we have stated pertaining to suits against receivers in the federal courts are strictly observed by them.

The judgment of the district court must therefore be affirmed.

All the justices concurring.

JURISDICTION OF EQUITY TO SET ASIDE JUDGMENT—TRIAL BY MEMBER OF THE BAR.

BLACKBURN v. BELL.

Supreme Court of Illinois.

[Filed at Springfield, June 20, 1879.]

Although a judgment rendered by a member of the bar, and not by one commissioned as judge, is void, yet, when the parties willfully, knowingly and fraudulently submit to a trial before one whom they know to be a mere intruder upon the judicial bench, go through with the same to a judgment, and on the appeal of the case make no exception to the trial on the score of incapacity of the person who acted as judge, and when the record purports to be true and regular on its face, the court of chancery has no power to set aside the judgment at the suggestion of one of the perpetrators of the fraud. Whether a court of equity may, under the law and statutes of this State, expunge the record of a judgment, appearing upon the records of another county, *quære.*

BAKER, J., delivered the opinion of the court:

An action of assumpsit was commenced in the Edgar County Circuit Court by Sarah Jane Mann, now Sarah Jane Bell, against David S. Blackburn, and the venue in said cause was afterward changed to the Vermillion Circuit Court. At the regular February term, 1875, of the latter court said suit was pending therein for trial, and in said cause upon the records of said court for said term appears the following judgment, which is entered as of the "30th day of February term, 1875, March 6th, 1875."

"And now again come the parties hereto, by their respective attorneys, and the court having heard argument of attorneys herein, on motion for a new trial and in arrest of judgment, in vacation, and an agreement of the parties having been filed in this cause that the decision of the court on said motion should be entered of record as of the February term, A. D. 1875, aforesaid, and now, upon due consideration, the court being fully informed in the premises, said motions for new trial and in arrest of judgment are overruled.

"It is therefore ordered by the court that the said plaintiff have and recover of and from the defendant, David S. Blackburn, said sum of fifteen thousand dollars, damages found by the jury, aforesaid, together with her costs by her in her cause herein expended, with legal interest thereon from the 30th day of the February term, A. D. 1875, to wit: March 6th, 1875, and may have execution therefor against said defendant.

"Whereupon the defendant prays an appeal which is granted by the court, on defendant filing bond in the sum of thirty thousand dollars ($30,000), with security to be approved by the clerk of this court and by agreement of parties, said bond to be filed within thirty days from July 9th, 1875, and bill of exceptions by agreement to be filed within ninety days from said day."

A copy of said judgment is filed with the bill of complaint hereinafter mentioned, as "Exhibit A," and is the only portion of the record, or what purports to be the record, in said action of assumpsit that is set forth in or filed with said bill; the preceding orders, showing the submission of the case, trial by and verdict of the jury, and entry of motions for a new trial and in arrest of judgment, being wholly omitted in the record now before us.

From this judgment, so appearing of record in the Vermillion Circuit Court, the appellant, David S. Blackburn, perfected an appeal to this court by giving bond within the time limited in and by the foregoing order, in the sum of $30,000, with co-appellants as securities; which said appeal bond was duly approved by writing indorsed thereon, both by the clerk of the Vermillion Circuit Court and by the Hon. O. L. Davis, judge of said court. The condition of said bond, a copy of which is filed with the bill of complaint hereinafter mentioned as an exhibit, and prayed to be taken as a part of said bill, was as follows:

"The condition of the above obligation is such that whereas, the said Sarah Jane Mann did, on the 6th day of March, A. D. 1875, at a term of the circuit court then being holden within and for the county of Vermillion and State of Illinois, obtain a judgment against the above bounden David S. Blackburn, for the sum of $15,000 and costs of suit, from which judgment the said David S. Blackburn has prayed for and obtained an appeal to the Supreme Court of said State. Now, if the said David S. Blackburn shall duly prosecute said appeal, and shall moreover pay the amount of said judgment, costs, interest and damages rendered, and to be rendered against him, the said David S. Blackburn, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be null and void; otherwise to remain in full force and virtue."

The said judgment so appealed to this court was affirmed by us at the January term, 1877, and a petition for a re-hearing was considered and denied at the January term, 1878, and the case is reported in 85 Ill. 222. In the record then filed in this court, as is shown by the bill of complaint now under consideration, there was nothing to indicate otherwise than that the case had been duly tried and the judgment rendered by the legally elected and commissioned judge of the Vermillion circuit court. No point or suggestion to the contrary was made, either in the motion entered for a new trial or in the motion for arrest of judgment, or upon the appeal to this court, or in the petition for a rehearing.

Said judgment having been affirmed by this court and remaining unpaid, the plaintiff in the original suit, who had meantime intermarried with one Bell, brought an action on the appeal bond in the Edgar Circuit Court to the March term, 1878; whereupon Blackburn, the defendant in the original suit and the sureties on the appeal bond, who are co-defendants with him to the action on the bond filed, the bill and amended bill, which are now the subject of controversy. The bill as amended shows substantially the facts above stated, and charges there was no judge presiding in the Circuit Court

of Vermillion County when said original suit was tried, and the judgment thereon rendered; that said circuit court, from the inception of said trial to its close, in the selection of a jury, in determining the admissibility of evidence, in the giving of instructions to the jury, in receiving the verdict of the jury, and in rendering the judgment aforesaid, was held, conducted and presided over solely by one E. S. Terry, who had never been and was not, at said time, judge of said circuit court, or of any court in the State of Illinois; that he had never been elected or appointed to the position of judge of any court in the State; that he made no pretense to be a judge either *de facto* or *de jure*; that he had at said time no lawful power or authority to exercise judicial functions, and that he was, in presiding at said trial and holding said court, a mere intruder into the office of judge in violation of the constitution and laws.

It is further charged that said record is therefore false and fraudulent, that it purports to be the act of a judge and the judgment of a court, when there was no judge and no court, and that it was made without any power and authority. It is also stated said pretended judgment was taken by appeal to the Supreme Court of the State, and there being no error apparent in the record, it was by said Supreme Court affirmed, and that the same now remains in the said Circuit Court of Vermillion County in full force and unreversed and unsatisfied, so far as the records of said court show, and that there is no error apparent in the record of said pretended judgment. The bill as amended prayed for a temporary injunction upon the proceedings in the case at law, pending in the Edgar Circuit Court, upon the appeal bond; and that the judgment appearing upon the records of the Circuit Court of Vermillion County for $15,000, might be set aside, cancelled and for naught held, and adjudged and decreed to be void and of no effect and that all proceedings in the suit on the appeal bond might on the final hearing be perpetually enjoined, and for general relief.

A demurrer to this bill as amended was sustained by the Circuit Court of Edgar County, and the bill was dismissed. An appeal was perfected to the Appellate Court of the Third District, and the decree of the circuit sustaining the demurrer and dismissing the bill was there affirmed.

A further appeal was then taken to this court, and it is here urged the Appellate Court erred in affirming the decree of the circuit court and in not reversing the same.

The case of Hoagland v. Creed, 81 Ill. 506, is not necessarily decisive of this case. There the question arose upon a writ of error to the Morgan Circuit Court, and the record filed, affirmatively showed a trial before a member of the bar, and what purported to be a judgment rendered by him as judge of the Circuit Court of Morgan County. That which purported to be a bill of exceptions was signed by him. The record expressly showed the case was tried by a member of the bar and that his authority for assuming to act as judge was the agreement of the parties. The record did not purport to be a record made by a circuit judge. We then said: "It is impossible for us to close our eyes to the fact, however strongly we might be inclined to do so, that the record sought to be reviewed is one made by Edward P. Kirby, Esq., a member of the bar, and not by any one commissioned to act as judge." The subject of contradicting a record, or what purported to be a record, of a court, did not arise in that case. A record imports a verity; it can not be contradicted by parol evidence; it must be taken as absolute truth, and must be tried by itself. What is or is not a record is matter of evidence, and any instrument offered as such may be shown to be forged or altered. The bill avers, and the record exhibited with the bill shows, that "the judgment is upon the record of the Circuit Court of Vermillion County, and the record thereof still remains in the said circuit court," and that "there is no error apparent on the face of the record," and moreover it has been affirmed by this court and declared to be a valid and binding judgment. So tested by itself, and by the whole record as it remains in the court, it is a valid judgment and a verity.

The court of chancery in the county of Edgar is called upon to enjoin the collection of a judgment of the law court rendered in Vermillion county, while that judgment remains of record in the latter court unreversed, affirmed by the Supreme tribunal of the state and with no error upon its face. We will waive the question whether a court of equity may, under the law and statute of this State, expunge the records of another county.

It is clear the judgment proves itself a valid judgment, unless it can be impeached in the court of chancery. The latter court will not attempt to do this without it is made manifest the alleged judgment was the result of either fraud, accident or mistake. There is no claim that this judgment has been altered since it was entered upon the records of the court, nor is it even suggested there was any accident or mistake on the part of anybody in the rendering of the judgment or in the entry thereof upon the record. The case must be tested by the pleading, and the pleading must be taken most strongly against the pleader. The theory of the bill and the claim of appellants is there was no fraud in the entry of the judgment. Whoever comes into the court of equity must come with clean hands and must not come asking the court of conscience to aid them in getting relief from their own fraud or wrongful act, in the perpetration of which they knowingly participated.

Admit the allegations of the bill to be true. They, with the necessary implications that legally flow therefrom, show that appellee and the appellant, Blackburn, knowingly and wilfully engaged in the perpetration of a fraud upon the law and the courts of the country; that having a suit pending, the one against the other, in the circuit court, they conspired together and had the issues joined therein, submitted to a trial before one whom they knew to be a mere intruder upon the judicial bench; that they knowingly and wilfully went through with a trial before a jury impaneled by this intruder, equally participated in the trial, equally participated in the submission of the motion

for a new trial and in arrest of judgment, and equally participated in having a record of this trial and its results entered up in the records of the court, not as it really was and according to the facts of the case, but as though in fact and in truth the trial had been before the lawful judge of the court, and as though the judgment had really been entered by such judge. Not only this, but they joined in palming off this record upon this court as the genuine record of the Vermillion circuit court. Only after we had carefully examined and upon petition for rehearing had re-examined the record of the trial and the alleged errors therein, and had found and announced there was no error in the proceedings, and that the trial had been fair and a correct conclusion reached and a just judgment rendered, did said appellant desist from aiding and abetting in the perpetration of the fraud. Grant that the court of equity may enjoin or set aside the judgment of a court of law for fraud, yet it will not do so at the suggestion of one of the perpetrators of the fraud.

In Owens v. Ranstead, 22 Ill. 162, where a bill had been filed to vacate a judgment and enjoin its collection on the ground of a want of jurisdiction of the person of the defendant, this court said: "The power of a court of chancery to afford relief in a case like this, properly made out, cannot be questioned, but it must appear to the court that the party complaining has been guilty of no laches on his part and that he has been deprived of the opportunity of asserting his rights or making his defense through some accident or mistake not of his own procurement and to which he was not a willing pa ty, for a party has no claim to come into a court of equity to ask to be saved from his own culpable misconduct." We then quoted with approval the language of the Supreme Court of the United States in the case of the Marine Insurance Co. v. Hodgson, 7 Cranch, 332, to the effect that the fraud or accident must be unmixed with any fault or negligence in the complainant himself in order to justify an application to a court of chancery.

In Higgins v. Bullock, 73 Ill. 205, it was said: "A court of chancery has the undoubted power to afford relief in a proper case against a judgment at law, but it must appear that the party complaining has been guilty of no negligence or laches, and that he has been prevented from interposing a defense through accident, fraud or mistake without fault or blame on his part."

The appellants all joined in solemnly averring by their deed under their hands and seals, the existence of the judgment in the Vermillion Circuit Court, and agreed to pay the amount due on said judgment in case the same should be affirmed in Supreme Court; the bill filed by them is to be taken most strongly against them, and it must be presumed, in the absence of any allegations to the contrary, that they all well knew the case had been tried before one who was not the judge; that judgment had been entered by one who had no judicial authority to enter it, and had been entered upon the record of the court as though rendered by the rightful judge. Appellants were all thus parties to the fraud upon the law, and knowingly and wilfully assisted, by their own act and admissions, in imposing upon this court as a judgment of the circuit court that which they knew to be a forgery or a fabrication. As the appellants made their bed, they must lie in it. If the judgment was a fabrication, appellants assisted in its fabrication, and in giving it a standing as a judgment of a court. If a fraud has been perpetrated on the law and on the court of the State, they assisted in its perpetration. Equity will leave them just where they have placed themselves. Appellants and appellee went hand in hand in the commission of a fraud. They must abide the result; for if the wrongful acts have resulted in harm to one party and profit to the other, then equity will not relieve the wrong-doers from the consequence of their own conduct, even against their fellow wrong-doers. The court of chancery will touch nothing that is impure, but will close its doors against all who seek to come within its portals with unclean hands, and will leave them to their naked legal rights as best they may be able to get them, in the court of law. Appellants have stated their own case for themselves. They have stated it as strongly as they truthfully can. They mutually admit the justice and equity of the claim of appellee. They do not allege there either was or is a defense to the suit in which the judgment was rendered. In Owens v. Ranstead, *supra*, it was shown the judgment was unjust and inequitable, and that the defendant in the suit at law was not indebted to the plaintiff therein in any sum whatever. In Weaver v. Poyer, 70 Ill. 570, the bill showed by a detailed statement of facts, that the defendant had a complete and meritorious defense to the action at law in which the judgment was rendered. In the case of Stokes v. Knarr, 11 Wis. 391, the court said: "We do not deem it necessary to decide whether the justice of the peace lost jurisdiction of the case and power to enter any judgment, by neglecting to make any minute of the verdict or to enter it in his docket, until the day after it was recovered. It may be conceded for the purpose of this case that he did, and we still think it does not follow that a court of equity will interfere merely for a defect of jurisdiction in the court where the judgment is rendered. 2 Story Eq. Jur., sec. 298. On the contrary, they rarely interfere to prevent injustice, and if a party can say nothing against the justice of a judgment—can give no reason why in equity he ought not to pay it, a court of equity will not interfere, but will leave him to contend against it at law in the best way he can. Then there is the matter of an estoppel. In the case of Herrick v. Swartwout, 72 Ill. 341, we said: "It was necessary to introduce a copy of the record appealed from as it is recited in the condition of the bond, and the defendants were estopped from denying its existence." And in George v. Bischoff, 68 Ill. 237, it was said: "Defendants are estopped by the recitals in the bond to deny what they solemnly admit to be true, viz.: the existence of a decree against Brichoff and the legal effect of the engagement is to pay it, in case it shall be affirmed on appeal, or be liable for the

penalty of the bond." There are numerous other cases in this state where the same doctrine is announced. It is unnecessary here to say the principle of estoppel as announced in the decisions referred to, has so broad an effect as would preclude an injunction as to all forged and fraudulent judgments, if appeals had been taken from them. Suffice it to say that if the complainant come within the precincts of a court of equity and ask to be relieved from the results of a solemn admission by deed, that is a judgment of a court of competent jurisdiction, they must not show themselves to be *particeps criminis* in the fabrication of the judgment and the fraud upon the law and the courts. Appellants, by their own showing, are in no position to raise in the court of chancery the question they here seek to raise, and they show no grounds for equitable interference with that which at law must now be regarded as the judgment of a court of law. We know of no instance where a court of equity has presumed to vacate or enjoin the collection of that which upon the face of the record was a valid judgment of a competent court of law, unless it was upon some established principle of equitable jurisdiction, and when such judgment was the result of either fraud, accident or mistake. Nor do we know of any such interference where the party asking assistance of the court was a party to the fabrication and fraud charged in his bill, or when there was no pretence that the claim or demand from the payment of which it was sought to be relieved, was unjust, inequitable or even a hardship. We may well here go even further than this. Under the circumstances of this case as appellants had full knowledge of all the facts, which is the fair and legal presumption arising from their own statements, when they averred and covenanted in their deed that said judgment was a judgment of the Vermillion circuit court, they are now estopped from denying the existence of such judgment. We are of the opinion the demurrer to the original and amended bills of complaint was properly sustained and the bills properly dismissed by the circuit court, and that the appellate court was right in affirming the decree.

The judgment of the appellate court is affirmed.

CRIMINAL ATTEMPTS.

The discussion of Dr. Wharton, in his article entitled "Attempts," which appeared in this JOURNAL of the 18th of July, 1879, has led the writer to offer the following observations:

Attempts, *i. e.*, criminal attempts, are, in the law, acts having a criminal aspect, as much as acts attended with positive physical hurt; the amount of the injury resulting therefrom is, sometimes, but not always, less than that resulting from acts attended with physical hurt; the degree of punishment in both classes of cases depends upon the character of the offense; and this punishment, as well in one as the other class of cases, is, within certain defined statutory limits in some States, fixed by a jury, in others by the court, and in others by the court in the event the jury fail to fix the same.

Attempt implies criminal intent—the intent which is implicit in the perfect act. If there is no such intent, there is no attempt which the law condemns. The intent is inferable from acts done; acts which will convince a jury, beyond a reasonable doubt, that the intent existed. The amount of evidence required will vary according to the circumstances in each case, whether the charge be of an attempt or otherwise; but the acts proven must show an existing intent.

If there are no acts, of course there is no evidence of intent. Mere words, unaccompanied by acts of any kind, will not be sufficient to convict one of attempt to murder, mayhem or arson; they may be the hasty expression of a heated mind, or the loose expression of a frivolous mind; in neither of which cases will there be evidence of a criminal intent. But if the words are accompanied by positive acts sufficient to indicate an intent, a jury, under proper instructions, will be left to say whether in fact an attempt of the kind charged has been committed. All of this tends to show that Dr. Wharton has not arrived at a correct solution of the difficulties which he has endeavored to explain away.

The acts of the individual, as well as the things, persons and acts, against which his acts are aimed, and also those with which his acts co-operate, co-exist in every criminal attempt. The subjective condition of his mind is to be collected from all the environing circumstances, and these may consist of subjective as well as objective acts. Now, no person when he is charged with an attempt is in the situation of the man who aims a broom-stick at another; that circumstance alone would not prove an intent to commit a crime; hence, of course, would not prove an attempt. But if A buys a pistol, powder and balls, with the avowed purpose of laying in wait and killing B, and with the purpose of carrying out his avowed design, levels and discharges by mistake his pistol at night at a dark inanimate object, which he mistakes for B, B being in an opposite direction, but close enough to hear the shot, and A, imagining he had missed B, when the object failed to move, seizes a broom-stick and aims the same, in pretended sport at B, when B and others approach, these would be circumstances to be left to a jury to say what A's object was. Here the object of A is gathered from his mental and physical acts, and although the requisite condition of mind must exist, these acts are that from which the intent is inferred. To speak of a subjective test seems improper.

Unsuitability of the means or the object, or inadequacy of means, are circumstances from which a jury may be at liberty to infer want of criminal intent, essential to the perpetration of the crime. The test is not properly "did the offender intend to hurt, and did he take the means in his view calculated to effect his end?" It would rather seem to be, does the testimony convince the jury, beyond a reasonable doubt, that the person charged intended to hurt, and did he employ such means as, under the circumstances, beyond a reasonable doubt, convinced them that he was carrying out such intent? How can a jury say what his view was? Suppose, in their opinion, he used means which did show a design to carry out a criminal intent, yet the acts and statements of the person charged were to the effect that he did not believe the agent employed to be as dangerous as it was, what test is to be employed? Is a so-called subjective test to be employed? For instance, when A attempted to give poison, which he claimed was innocuous, by way of experiment, and his words and acts indicated that this was not an improbable view to take of his mental condition, yet that there were other circumstances equally strong, if not stronger, which indicated the contrary, what subjective test is here to be applied by the jury? Obviously, taking all the circumstances together, they must arrive at a verdict; there is no subjective test, such as Dr. Wharton seems

to contemplate, by which they could be solely governed. We can not, in other words, accurately speak of a theoretical subjective or objective test in ascertaining whether a given act shall be regarded as a criminal attempt.

To make an objective test a criterion of attempts, is to lead to many difficulties, as shown by Dr. Wharton. To make a subjective test the criterion is, to shield the intelligent and cunning, and to lessen *pro tanto* the security which we now enjoy..

Little Rock, Ark. M. M. C.

SOME RECENT FOREIGN DECISIONS.

STATUTE OF FRAUDS — CONTRACT CONTAINED IN SEVERAL WRITINGS.— L, a builder, wrote to M, an auctioneer and house agent, and signed the following document: "I hereby agree to purchase" three plats "freehold land for £310, and agree to pay a deposit of £31 as part of the purchase-money." M's name was not mentioned in the document. M signed a receipt for £31 "as a deposit on the purchase" of the three plats. *Held*, that the writings were sufficient to constitute a contract within the statute of frauds.—*Long v. Miller.* English Court of Appeal, 27 W. R. 720.

SALVAGE —IMPRUDENT NAVIGATION OF TUG OCCASIONING NECESSITY FOR ASSISTANCE. — By the imprudent navigation of a steam tug employed under a towing contract, the ship in tow was placed in a position of danger, from which the same steam tug rescued her after her anchors and chains had been slipped: *Held*, that the steam tug was not entitled to salvage remuneration, and that the vessel in tow might claim, by way of counterclaim, damages for the loss of her anchors and chains. — *The Robert Dixon.* English High Court, Adm. Div. 27 W. R. 736.

LEASE—CONSTRUCTION OF — COVENANT NOT TO ASSIGN OR PART WITH POSSESSION—FORFEITURE. —A lease to H and B, who carried on business upon the demised premises in partnership, contained a covenant by them that "they, their executors, administrators and assigns, or any or either of them," would not assign or "part with the possession" of the premises, or any part thereof, "to any person or persons" without the consent of the lessor. H and B agreed to dissolve partnership, and that H should assign to B all his estate and interest in any leasehold premises on which the partnership business was carried on with the consent of the lessor. No consent was obtained, and no assignment was executed; but B was let into sole possession of the premises by H. *Held*, that there was no forfeiture under the lease.—*Mayor v. Westcott.* English Court of Appeal, 27 W. R. 841.

RIGHT OF WAY — APPENDANT OR APPURTENANT —TWO WAYS—WAY OF NECESSITY — CONVENIENT WAY.—A contracted to sell the land and houses in a certain street, "with the appurtenances." There was a road leading into this street at both ends over freehold property of the vendor, but there were no words in the contract with regard to any right of way. The purchasers claimed a right of way over both the roads. *Held*, that they were not appendant or appurtenant to the property sold, and, therefore, the purchasers were only entitled to a right of way over one of them as a way of necessity. *Held*, also, that both ways being convenient, the vendor, as grantor, was entitled to elect over which of the two roads he would grant that right of way.—*Bolton v. School Board of London.* English High Court, Chy. Div. 40 L. T. Rep. 582.

DEED OF SEPARATION — CUSTODY OF CHILD — POWER OF COURT.—By a separation deed, executed after the infants custody act, 1873, it was agreed that the mother should have the custody of an infant daughter. Subsequently to this, when the daughter was eight years old, a petition was presented by her under the above act, by her father as next friend, praying that she might be given up by the mother to the custody of the father. The petition alleged that the mother professed and taught atheistical and irreligious views, and had published a pamphlet which had been found by a jury to be calculated to deprave public morals. *Held*, that an absolute delegation by a father of his paternal rights over an infant was by law impossible; that the court would consider what was for the benefit of the infant; that it would be greatly to the detriment of the infant to be brought up amid the influences to which it was exposed while under the custody of the mother, and that the infant must be given up to the father.—*In re Besant.* English Court of Appeal, 27 W. R. 741.

MALICIOUS PROSECUTION —AUTHORITY OF BANK MANAGER.—1. An authority in an agent to arrest offenders, and to institute criminal proceedings, can only be implied where the duties which he has to perform can not be efficiently discharged for the benefit of his employer, unless he has power promptly to apprehend offenders on the spot. 2. W, the acting manager of the appellants, commenced criminal proceedings against the respondent, a merchant at Sydney, on a charge of stealing a bill of exchange, which proved to be groundless. In an action for malicious prosecution brought by respondent against the bank, *held* (reversing the judgment of the court below), that such proceedings not being in the ordinary routine of banking business, and the evidence not showing any case of emergency, the judge misdirected the jury in telling them that such authority was to be inferred from W's position alone; and, in the absence of direct evidence of such authority, the bank was not liable. 3. When interest on the amount of a verdict is given, and included in the judgment, such interest must be taken into account in considering whether the amount at issue reaches the limit allowed for an appeal.—*Bank of New South Wales v. Owston.* English House of Lords, 20 Alb. L. J. 32.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF MICHIGAN.

June Term, 1879.

DELINQUENT TAX LANDS CAN NOT BE SOLD AFTER THE YEAR IN WHICH THEY SHOULD HAVE BEEN RETURNED.—In 1877, the then auditor-general accepted, in his discretion (Houghton County v. Auditor-General, 36 Mich. 271), delayed tax returns from a county for the years 1870 and 1871, and directed the lands to be advertised for sale at the time of the regular tax sales in October, 1877. Most of them were struck off to the State for want of bidders, and when the returns were made, the county was credited on the auditor-general's books with the amount of the bids to the State. The account being thus stated, with this credit being a part of it, a balance was found due the county, and the succeeding auditor-general refusing to give a warrant upon the State treasurer for this sum, a *mandamus* is asked. *Held*, that the auditor-general could not lawfully order a sale of lands for delinquent taxes in a year subsequent to that in which they should have been returned to him. This would postpone the whole collection of taxes, and might seriously embarass the whole administration of local government. While he might in his discretion have received any returns offered in time for the regular sales of the year, he could have no more power indirectly to

postpone a sale to a subsequent year, by postponing the reception of the return, than to do so by more direct action. A purchaser of lands might be greatly wronged if they might subsequently be sold for a tax long since levied, but appearing when he bought only upon an unaccepted return which the auditor-general then retained, subject to his future discretion. Those provisions of the tax laws, a departure from which would prejudice property owners, can not be held to be merely directory. Clark v. Crane, 5 Mich. 151; Hoyt v. East Saginaw, 19 Mich. 39. All the proceedings in ordering the sale and in stating the account with the county upon the return of such sale were unauthorized and void. *Mandamus* denied. Opinion by COOLEY, J.—*People v. Auditor-General.*

WARRANT TO COLLECT MONEYS FROM DEFAULTING TOWNSHIP TREASURER—TROVER—EXEMPTION FROM EXECUTION—ASSENT TO PROCESS.—A county treasurer issued to the sheriff a warrant, under §§ 1029, 1030, Comp. L., for collection of the moneys, for which a defaulting township treasurer was bound to account to the county, and the sheriff seized and sold personal property, and after retaining his fees paid the rest to the county treasurer, who carried it to the proper fund, and credited the township treasurer with the amount. In trover by the latter against the county treasurer and the sheriff: *Held*, 1. That plaintiff could not claim the benefit of the exemption laws for the goods taken, for a joint conversion is here alleged, and the sheriff's non-observance of the exemption, if the latter were applicable to such process, would not be an act of conversion on the county treasurer's part. See Kaley v. Shed, 10 Met. 317. 2. The formal credit to plaintiff on the county treasurer's books could not bar the action; first, because part of the proceeds were retained for sheriff's fees; second, because if at all available as matter of defense, it could only be so used by way of mitigation of damages; and, third, because as the appropriation was only one of the steps in the transaction complained of, it could not avail the defense, even by way of mitigation, unless in some way assented to by the plaintiff. Northrup v. McGill, 27 Mich. 234; Dalton v. Laudahn, Id. 529. 3. While, as was decided in Weimer v. Bunbury, 30 Mich. 201, the principle underlying these statutory provisions is not unconstitutional, a warrant must show, as this fails to do, the facts which presumptively make out a case, in which the county treasurer issuing it had jurisdiction to do so. 4. The fact that plaintiff was present at the sale under the warrant and made no objection, has no force as between these parties to show his assent. 5. The county treasurer's statement that plaintiff told him the warrant "better be held on to" until the next day, at which time, if he did not appear, "they might issue it," could not, if undenied, be construed as proving that the emission of the warrant actually issued had plaintiff's assent. The consent, if any, was not to a warrant that should be framed in derogation of law, but the parties appear to have aimed expressly at a process of the form contemplated by law. Opinion by GRAVES, J.—*Bringard v. Stellwager.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

July, 1879.

JURISDICTION OF PROBATE COURT—HOW QUESTIONED.—In a suit by an administrator to recover funds intrusted by his intestate to the keeping of the defendant, the latter, by his answer in abatement, denied the jurisdiction of the probate court to grant letters of administration to the plaintiff, alleging that the intestate never was an inhabitant of, or a resident of the county of said court, and left no estate to be administered therein. The records of said court showed that the only ground alleged in the plaintiff's petition for this grant of administration, was that the intestate last dwelt in C in that county. *Held*, that under Gen. Stats. ch. 117, § 4, providing "that the jurisdiction assumed in any case by the probate court, so far as it depends on the place of residence of a person, shall not be contested in any suit or proceeding, except on an appeal in the original case, or where the want of jurisdiction appears on the same record," the jurisdiction of the probate court could not be contested. Opinion by COLT, J.—*McFeely v. Scott.*

DOCK — DEGREE OF CARE REQUIRED IN OWNER OF.—In an action to recover for damages received by the plaintiff's schooner while lying in the defendant's dock, it was *held*, that the defendant was bound to exercise ordinary and reasonable care that his dock should be in a suitable condition for such vessels as he invited or allowed to come there; and the fact that the defendant exercised ordinary care in keeping his dock safe for vessels, and that this vessel received damage there because she was wider than the width usually occupied by vessels at that dock, but for no other reason, would not exonerate the defendant. Opinion by MORTON, J.—*Nickerson v. Tirrell.*

LIFE INSURANCE — ENDOWMENT POLICY — FORFEITURE.—The plaintiff brought suit upon a policy of insurance issued to him by the defendant, and payable to a person named in it in case of the plaintiff's death within ten years, but to the plaintiff if he should survive that period. It contained an express condition "that if any premium due upon this policy shall not be paid at the day when the same is payable, this policy shall thereupon become forfeited and void; this condition, however, being subject to the provisions of the 186th chapter of the acts of the legislature of Massachusetts in the year 1861;" which statute provides that after deducting from the net value of the policy, at the time when the premium becomes due and is not paid, to be ascertained according to the "combined experience" or "actuaries" rate of mortality with interest at four per cent. per annum, any indebtedness to the company or notes held by the company against the assured, four-fifths of what remains shall be considered as a net single premium of temporary insurance, the term to be determined by the age of the party and the assumptions of mortality and interest aforesaid. The second section provides that if the death of the party occur within the terms of such temporary insurance, the company shall be bound to pay the amount of the policy. The policy was issued August 9, 1866, and the premiums were to be paid on or before the 9th day of August in every year until ten annual premiums should have been paid. The plaintiff paid the premiums until August 9, 1875, when he failed to pay the premium that day due. The plaintiff survived said ten years, and the defendant had due notice and proof before action brought. *Held*, that in construing the forfeiture clause, as qualified by the importation of the statute into it, the expiration of the ten years must be regarded as equivalent to the death of the insured, so far as regards the question when the policy becomes payable; and that as the plaintiff survived the period of ten years and duly notified the defendant of that fact, and the value of the policy when he failed to pay the premium was sufficient to furnish a premium for a temporary insurance extending beyond the expiration of said ten years, he is entitled to recover, and the defendant is bound to pay the amount of the policy, less the amount due from him to the defendant. Opinion by SOULE, J.—*Carter v. John Hancock Mut. Life Ins. Co.*

SUPREME COURT OF ILLINOIS.

[Filed at Ottawa, June 21, 1879.]

LIABILITY OF STOCKHOLDERS—BANKING ACT—EVIDENCE OF OWNERSHIP OF STOCK.—In this case John Naper, the appellee, sued David Dows, the appellant, in the Superior Court of Cook County, and recovered judgment for $1,437.55. He claimed that amount to be due him as a depositor in the savings department of the Marine Company of Chicago. The suit was prosecuted on the theory that appellant was a stockholder in said Marine Company to the amount of $5,000, and as such was liable to appellee for the funds deposited, by virtue of section 10 of the Act of February 21, 1861, amending the charter of said corporation. It is urged by appellant that said amendatory act, inasmuch as it conferred banking powers, and was never voted on by the people of the State, as well as for other reasons suggested, was not a valid enactment, but was unconstitutional, null and void. BAKER, J., says: "We do not deem it necessary to pass upon the constitutionality of the act in question; for, even should we assume the act to be unconstitutional, the case would fall within the rule announced by us in McCarthy v. Lavashe, 89 Ill. 271. It was there held that even though the provisions of a charter may be unconstitutional, yet if the stockholder has acted under it, and thereby induced or contributed to the loss of a creditor of the corporation, then the stockholder is estopped from denying his liability under its provisions. In this case it was shown by the admissions of appellant that he was a stockholder in said Marine Company to the amount of $5,000. * * * We do not know of any rule of law which would compel a creditor of a corporation, seeking to fasten a personal liability on a stockholder to prove the ownership of stock by record evidence." Affirmed.—*Dows v. Naper.*

FRAUDULENT CONVEYANCE—BILL TO SET ASIDE—MUST BE BY ONE HAVING JUDGMENT LIEN—ISSUANCE OF EXECUTION.—This was a bill in equity brought by Hugh Tiernan against Salome Weis and others, to remove an alleged fraudulent deed made to Salome Weis by one Wordsworth. It is alleged in the bill that Tiernan had obtained a judgment against Frederick Weis, the husband of defendant; that immediately after obtaining the judgment an execution was issued, and returned "*nulla bona;*" that at the time Frederick Weis was the equitable owner of a large interest in real estate, which he afterwards sold and exchanged to one Wordsworth for two hundred acres of land in Lake county, and that he caused the deed of the same to be made to his wife, for the purpose of cheating and defrauding his creditors. Plaintiff asked that the deed be set aside, and that the title be declared in Frederick Weis, etc. On hearing, the court granted the relief sought. Defendant appeals. CRAIG, C. J., says: "Under the issues made, it devolved upon the complainant to prove a judgment, the issuing of an execution within a year from the rendition of the judgment, a return thereof of "*nulla bona;*" that an alias execution was issued, and returned "*nulla bona,*" and that a pluries execution was issued, and levied on the land as alleged. The proof upon the latter subject is entirely too vague and uncertain. The proof that an execution issued within one year from the rendition of the judgment was indispensable; the right to maintain the bill depended upon such proof, and we are aware of no authority upon which the bill could be maintained without such evidence. The bill could not be sustained if the judgment was not a lien upon the land, and no lien would exist unless an execution had been issued within a year. This is the doctrine of 52 Ill. 98, where a bill like the one under consideration was filed, in which it was said: 'If a party has no lien in the land alleged to be fraudulently conveyed, such conveyance can do him no injury. The record in this case fails to show that complainant had a lien on this land, no execution having been issued within one year from its date. The presumption of law is that the judgment was paid, and to enable the complainant to issue an execution, the judgment would necessarily have to be revived by *scire facias.*' See, also, 53 Ill. 464. As the judgment set out in the bill was no lien on the lands independent of other questions, the decree was not warranted by the evidence." Reversed.—*Weis v. Tiernan.*

BOOK NOTICE.

AN ANALYTICAL DIGEST OF THE LAW AND PRACTICE of the Courts of Common Law—Divorce, Probate, Admiralty and Bankruptcy—and of the High Court of Justice and the Court of Appeal of England, comprising the reported cases from 1756 to 1878, with References to the Rules and Statutes, founded on the Digests of Harrison and Fisher. By EPHRAIM A. JACOB, of the New York Bar. Vol. 1. New York: George S. Diossy. 1879.

A complete digest of the English Decisions (except equity) will soon be within the reach of the American lawyer. It is somewhat singular, yet at the same time creditable to the enterprise of American law publishers, that a work like this should appear in this country, before such a one has been even announced in England. The lawyer on that side of the water searching for precedents, is forced to examine many volumes—the five volumes of Fisher's Harrison's Digest, the nine of the Annuals, and the different volumes of the law reports from 1877 to date. The American edition will comprise all these within seven volumes. The incomplete English edition costs $130; the complete American edition will be sold for $7.50 a volume.

The overruled cases have been omitted. This, as well as the following features, distinguish, in its execution, the American from the English work; the new and revised classification of each subject, and the very large number of cross-references which have been made, thereby rendering it comparatively easy to refer to the decisions on any given point of law; the use of appropriate captions to indicate the topic embraced in paragraphs, thereby bringing decisions of a similar character together; and the introduction of a full and complete index. The value of such a work is apparent; and the execution of the venture so far as the first volume is concerned, is excellent. Mr. Jacob's labors deserve the longer notice, which we are compelled for want of time and space to hold over until the work has progressed further.

NOTES.

JUDGE DILLON was recently tendered a banquet, by a numerously signed address, including among its subscribers the leading lawyers, merchants, and citizens of St. Louis. In a letter of the 15th inst., he feelingly expresses his regret that unexpected demands of business in the East prevent him from accepting the proffered honor, as he had hoped to do, saying in closing: "The fearless and independent discharge of the duties of a judge will inevitably bring him in frequent collision with private interests and public sentiment. In such a discharge of duty, the judge needs at at all times the consciousness of the support of the substantial interests of the community. It gives me pleasure to say that I have always noticed a sound, healthy and enlightened public opinion on this subject among your citizens, and every judge in this country, of whatever grade, will be animated, cheered and strengthened by your influence and your example."